BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CARLOS E. MARTINEZ	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,063,614**
	)	
U.S.D. #501	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the February 13, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Patrick M. Salsbury, of Topeka, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits dated February 13, 2013, and all pleadings contained in the administrative file.

The ALJ found that claimant, while at respondent's job fair, tripped over a table and hit his back on a chair, aggravating a preexisting thoracic spine condition and, therefore, claimant's accidental injury did not arise out of and in the course of employment. The ALJ further found that tripping over a table and hitting a chair was a neutral risk to claimant and could have occurred at home.

ISSUES

Claimant requests review of "[w]hether claimant's accident arose out of and in the course of his employment."[1]

Claimant's attorney did not file a brief.

Respondent argues claimant did not sustain his burden of proof that his accidental injury arose out of and in the course of employment because: (1) claimant was not employed by respondent; (2) stumbling over the chair was not the prevailing factor causing

[1] Application for Review at 1.

claimant's injury and need for medical treatment; (3) there was no requirement for claimant to attend the job fair; and (4) stumbling over a chair is an activity of daily living and was not a requirement of his job.

The sole issue raised on review is: did claimant's sustain a personal injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the time of the preliminary hearing, claimant had been employed as a substitute teacher approximately five years for respondent. He does not substitute teach during the summer. When he substitutes, claimant does not enter a contract with respondent, unless it is a long-term substitute. Claimant desired to change his job position with respondent, so he attended a job fair held by respondent in order to get paperwork, ID cards and to schedule training for a paraprofessional position. The job fair was on August 8, 2012, in the cafeteria of one of respondent's schools. At the job fair, claimant went to sit a table when he tripped and fell backwards into a chair, injuring his mid lower thoracic back. For 15-20 minutes claimant could barely move or breathe. A school nurse directed claimant to see a physician.

Claimant sought medical treatment the same day he fell at Stormont Vail WorkCenter, where he saw Dr. Dale Garrett. Dr. Garrett initially diagnosed claimant with pain, thoracic spine and chronic pain. The doctor prescribed medications to help with the pain and muscle spasms. It was recommended that claimant apply ice for 20 minutes 4 times a day for 3 days as well as apply moist heat for 20 minutes upon awakening. Dr. Garrett restricted claimant to modified duty, which included no lifting, pushing or pulling greater than 20 pounds and no prolonged or repetitive bending or twisting at the waist.

Dr. Garrett ordered x-rays of the thoracic spine and an MRI on January 15, 2013 and released claimant to work. The MRI showed: (1) a small central to left central disc protrusion with slight flattening of the ventral cord surface at T3-4; (2) a small posterior disc extrusion extending superior and inferior to the disc space at T5-6 with minimal flattening of the ventral cord surface; and (3) small disc protrusions at T6-7 and T8-9. On January 31, 2013, claimant reported that he had pain in the left thoracic area that is completely new since the August 8, 2012 incident. Dr. Garrett's January 31, 2012, notes also indicated that claimant had similar pain like this for years, even before the August 8 incident, but feels that in the past few months the pain radiated into the right leg. Dr. Garrett diagnosed claimant with: (1) left-sided anterior, inferior chest pain, post herp neuralgia; (2) chronic pain, bilateral thoracic spine; (3) bilateral labral tears of shoulders, chronic pain and (4) degenerative disc disease. He also released claimant to return to regular duty.

Dr. Garrett opined that, "Based upon prior records, patient description of injury, his complaints and physical exam findings, this MD does not believe the incident that occurred on 8-8-12, is the prevailing factor for his complaints."[2] Dr.Garrett then stated, "This problem is not related to work activities."[3]

Claimant submitted his paperwork to respondent and attended the training on August 9th and 10th. Claimant was told he would get paid $10.75 per hour for the two days of training, but did not get paid. He continues to work for respondent as a substitute teacher.

Claimant has a history of spine injuries. He was involved in an automobile accident in 1995 and as a result, a cervical fusion was performed. In 1998 or 1999, claimant was involved in another accident for which he had problems with the upper thoracic region, the T4-5 level. Claimant testified he did not undergo surgery for that injury, but did undergo extensive therapy. Claimant testified that he continues to do his exercise program at night and in the mornings which includes 100 to 125 bicycle exercises that take about 30 minutes. Claimant is a soccer referee and preps for soccer season by walking and jogging.

Dr. Edward Prostic examined and evaluated claimant on November 19, 2012, at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history, took x-rays of the cervical and lumbar spine and also performed a physical examination of claimant's cervical and lumbar spine. Dr. Prostic indicated claimant's greatest concern was his lower back, but also complained of aches about the posterior neck with frequent headaches and constant pain about his tailbone. Dr. Prostic opined: "The work-related accident of August 6, 2012 while employed by USD #501 is the prevailing factor in causing the injury, the medical condition and the need for medical treatment."[4]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(c) provides:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) provides:

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[2] P.H. Trans., Res. Ex. A at 3.

[3] *Id.*

[4] *Id.*, Cl. Ex. 1 at 3.

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f)(2) and (g) provides:

> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The undersigned Board member agrees with the ALJ that claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment with respondent. Claimant was a substitute teacher who did not work for

respondent during the summer of 2012. Claimant, was not working for respondent when he attended the to job fair to seek a position with respondent as a paraprofessional. Claimant was not paid by respondent to attend the job fair and claimant was not under contract to work for respondent at the time of the job fair. K.S.A. 2011 Supp. 44-508(b), in part, states:

> "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: . . . persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations . . .

Simply put, this Board Member finds that at the time of the accident, claimant was not an employee of respondent.

Even if claimant was an employee of respondent at the time of the accident, this Board Member agrees with ALJ Sanders that claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment with respondent. Claimant testified that he injured his thoracic spine in the August 8, 2012 accident. Dr. Garrett examined claimant three times, and ordered x-rays and an MRI of claimant's thoracic spine. Dr. Garrett opined that based upon prior records, claimant's description of injury, his complaints and physical exam findings, the incident that occurred on August 8, 2012, was not the prevailing factor for his complaints.

Despite the fact that claimant alleged he injured his thoracic spine as a result of the August 8, 2012 accident, Dr. Prostic evaluated only claimant's cervical and lumbar spines. Nor does Dr. Prostic indicate that he reviewed Dr. Garrett's records, or the x-rays and MRI ordered by Dr. Garrett. Therefore, Dr. Prostic's opinion in this claim on prevailing factor must be disregarded.

This Board Member finds it unnecessary to address respondent's contentions and the ALJ's findings that claimant's accident arose out of a neutral risk and that stumbling over the chair was a normal activity of day-to-day living.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

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[5] K.S.A. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member finds that the February 13, 2013, preliminary hearing Order entered by ALJ Rebecca A. Sanders is affirmed.

IT IS SO ORDERED.

Dated this 21st day of May, 2013.

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HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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